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No. 83-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON *and* TAKERU KAMIYAMA,

Petitioners,

—v.—

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF HAWAII, OREGON AND RHODE ISLAND SUPPORTING A GRANT OF CERTIORARI

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QUESTION PRESENTED

Whether, in the course of resolving the principles of tax law and constitutional law put at issue by the petitioners in the courts below, the decision of the Second Circuit herein fundamentally skews heretofore unquestioned principles of trust law in a manner that, if adopted in other jurisdictions, would handicap states in their efforts to enforce accountability upon those to whom funds are entrusted for the benefit of others.

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STATEMENT OF INTEREST

The *amici* states urge that certiorari be granted in this case because of the serious implications of the Second Circuit's decision with respect to the enforcement of charitable trusts. The states are charged with assuring the probity of officials and individuals entrusted with the possession of funds belonging to others, the preservation of the funds themselves and the faithful discharge of the trusts upon which they are given. Chief among the states' responsibilities in this area is the oversight and enforcement of charitable trusts. It is essential that the states be able to

enforce accountability upon trustees, both civilly and, in the case of defaults and defalcations, criminally. The trust concept is vital to a significant segment of social and legal intercourse, and the integrity of that concept is equally vital to the enforcement tools which the states have provided to preserve and maintain it.

The decision of the Second Circuit in *United States v. Moon* casts doubt upon the integrity of the trust concept itself. The decision alters the rules for determining whether a relationship of trust exists in the first instance. By focusing decisive attenton on the use to which funds are put rather than on the intent with which they are conveyed, the court in effect puts the fox in charge of the hen house, since it is the custodian's application of funds to his own use—whether or not the donors contemplated some freedom to use funds in just this way—which "proves" that the funds are personal in character, thus negating trust existence. This is a shocking concept and one whose dismaying implications are not difficult to project.

The law of trusts, of course, varies from state to state. The decision of the Second Circuit, applying New York law, has no direct effect on the trust laws of the *amici* states. Nevertheless, the majority's analysis in this case so fundamentally skews heretofore unquestioned principles of trust law that its potential ramifications cannot responsibly be ignored. If the Second Circuit decision is allowed to stand, it may inform and thereby distort the law of other jurisdictions. At best, the decision of a leading federal circuit court will provide a basis for inventive litigants to reopen previously settled questions of trust law in the *amici* states. If this Court were to endorse, tolerate or ignore the treatment of trust law issues in this case, the potential mischief of the Second Circuit decision would be abetted.

Amici therefore urge that the Petition for Writ of Certiorari in this case be granted and that the Court take this opportunity to disapprove the Second Circuit's trust analysis—an analysis that manifestly pervades and underpins the circuit court's rulings with respect to the federal tax and constitutional law issues addressed by the petition of defendant Moon. *Amici* take no position on those other issues raised in that petition. We believe, however, that the trust issue itself warrants review by this Court.

ARGUMENT

UNDER THE RULES ESTABLISHED BY THE COURT BELOW, A DEFAULTING TRUSTEE MAY TURN TO ADVANTAGE THE VERY ACTS CONSTITUTING HIS EMBEZZLEMENT BY USING THEM TO FASHION A FORMIDABLE DEFENSE.

(a) Introduction

In this case, funds raised by Church members were entrusted to their spiritual leader, the Church's founder, and placed in bank accounts standing in his name. Unrebutted testimony of certain members indicated that the funds were intended as gifts for the Church. *United States v. Moon*, 718 F.2d 1210, 1224 (2d Cir. 1983). Some of the funds were invested in business enterprises; other portions were made available to Church entities for the acquisition and furnishing of properties and facilites. *Id.* at 1219-21; Trial Transcript, *United States v. Moon*, [hereinafter cited as Tr.] 2863-64, 2991, 3017, 5694-95, 4547, 5766-68, 5770-71, 5818-19, 3422-92, 4083-84, 5613-19. Still others were used by the defendant leader for personal living expenses and the education of his children. 718 F.2d at 1220. These latter items were reported on his personal returns as income to him. Tr. 3729-30, 3735, 3812-13, 4094, 4982-98.

In opposition to the claim that the funds were held by the defendant as trustee for the benefit of the International Unification Movement, an unincorporated body, the government contended, successfully, that the defendant was the *beneficial* as well as the legal owner of the corpus and was therefore taxable on the income it earned.[1] 718 F.2d at 1224-25.

The Court below agreed that the government had proved this

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1 The issue of beneficial ownership was concededly "central to the determination of guilt or innocence" in the case. *United States v. Moon*, 718 F.2d 1210, 1242 (2d Cir. 1983) (Oakes, J., dissenting); *id.* at 1217. If the assets were beneficially owned by the International Unification Movement, then Moon held them as trustee and vice versa. Beneficial ownership and trust existence, *vel non*, are simply two ways of describing the same question.

contention beyond a reasonable doubt on the basis of evidence indicating that:

(a) Defendant held title to the funds and control over them;

(b) Certain Church entities (other than the claimed beneficiary) were formally incorporated and maintained corporate bank accounts;

(c) The funds were put to uses which, in the jury's secular view, appeared personal rather than religious in character, and the defendant thus "seemingly regarded . . . [the funds] as his own. . . ."[2]

(d) Elders in the Church were told that the funds belonged to "Father" (a reference to the defendant as the Church's spiritual leader), rather than to other Church entities. *Id.* at 1220.

The majority of the Second Circuit panel excluded from its consideration of this issue all evidence regarding the source of the funds, the purpose for which they were raised, or the intent of the Church members who contributed them. *Id.* at 1245 (Oakes, J., dissenting); *id.* at 1220-22. Nor did the panel majority reply to Judge Oakes' dissenting observation that the jury's charge left it free to find against Moon on the issue of beneficial ownership without even considering the crucial issue of donor's intent. *Id.* at 12-45-46 (Oakes, J., dissenting).

(b) **Trust Creation**

We first discuss what have hitherto been regarded generally as settled principles of trust law before addressing the changes wrought by the decision below.

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2 Evidence showing that the uses to which the funds were put were, under the doctrine and teaching of the Unification Church, actually religious in character rather than personal to the defendant, was either disregarded by the appellate court or excluded by the trial court which emphasized several times to the jury that the defendant's religion had *nothing* to do with the case. Tr. 6538; *see also* 718 F.2d at 1227-28.

All that is necessary for the creation of a voluntary trust[3] is a gift or transfer coupled with an intent on the part of the trustor or donor that a trust or use be attached to it. Restatement (Second) of Trusts §2 (1959) [hereinafter cited as Restatement]; I A.W. Scott, The Law of Trusts §17 at 174 & n.1 (3d ed. 1967) [hereinafter cited as Scott]. This intent is the critical factor. Restatement §23; I Scott §§2.8, 23 at 44, 190. With it a trust can come into being; without it, there is merely a conveyance of a gift absolute. The donor's intent to qualify a gift or limit its purpose and usage separates the legal and beneficial ownership of the corpus, placing legal title in the trustee and beneficial ownership in the individual or entity which is the object or beneficiary of the trust. Restatement §2; I Scott §2.3 at 37-38.

Often, intent is expressly stated.[4] This is the purpose of a written declaration of trust, the usual means by which express trusts are created. I Scott §17 at 174. Intent can as well be orally expressed. Restatement §24(1). Even where no specific statement is made, however, the circumstances surrounding a gift may themselves supply the requisite evidence of intent, in which case an implied trust will be raised. *Id.* §24(2); I Scott §24 at 192.

Evidence that a trustee misused trust property or diverted it to personal applications may establish a breach of trust in the civil context or theft such as embezzlement in a criminal context. Such evidence, in itself, is not ordinarily even relevant to the issue of beneficial ownership—i.e., whether, in the first instance, a trust exists or not. *See Herbert v. Commissioner*, 377 F.2d 65 (9th Cir. 1967); *accord, United States v. Scott*, 660 F.2d 1145 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982);

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3 As distinguished from resulting trusts, constructive trusts and other "involuntary" trusts which arise by operation of law. V Scott §§404, 404.1, 440.1, 461, 462 at 3211-13, 3315-17, 3410-13.

4 This is less frequently the case with church donations in small amounts, e.g., to the collection plate in the course of a church service.

Rev. Rul. 71-499, 1971-2 C.B. 77; *see also People v. Swanson*, 174 Cal. App. 2d 453, 457-58, 344 P.2d 832 (1959).

(c) **Charitable Trusts**

The law traditionally has looked with favor upon charitable and religious trusts.[5] It has consistently construed both instruments and circumstances liberally to resolve ambiguities and to assist in the raising and preservation of such trusts. IV Scott §§371.2, 371.3 at 2883-84, 2885; 718 F.2d at 1243 (Oakes, J., dissenting); *In re Price's Will*, 264 A.D. 29, 35 N.Y.S. 2d 111, 114-15, *aff'd*, 289 N.Y. 751, 46 N.E.2d 354 (1942); *Estate of Connolly*, 48 Cal.App.3d 129, 133, 121 Cal. Rptr. 325 (1975). A religious or charitable trust, in contrast to the private express trust, will not fail for lack of a definitely named, identifiable beneficiary. In fact, *no beneficiary at all* need be named so long as it is clear that the use or purpose is religious or charitable in nature. Restatement §§364, 351, 348; IV Scott §§ 348, 351 at 2769, 2794; *see also In re Faulkner's Estate*, 128 Cal.App.2d 575, 578, 275 P.2d 818 (1954).

Courts consistently have construed gifts from church members to church leaders as being gifts in trust for the benefit of the church rather than as personal gifts to the individual church officers, where the evidence establishes nothing more than the fact of a gift from a *congregant* to a *church official*. *Winn v. Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979); *Morey v. Riddell*, 205 F.Supp. 918, 921 (S.D. Cal. 1962); *Archbishop v. Shipman*, 79 Cal. 288, 21 P. 830 (1889); *Fink v. Umscheid*, 340 Kan. 271, 19 P. 623 (1888); IV Scott §§351, 371.3 at 2797-98, 2885 & n.4. Even where the gifts were seemingly absolute in form, the same result has in the past obtained. 718

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5 While it is quite possible for a "religious" trust to be wholly private in character—e.g., a gift to Archbishop X in trust for the saying of masses for the soul of Y—the terms "religious" and "ecclesiastical" are used herein in their general sense as being interchangeable with the word "charitable," it being universally held that religious or ecclesiastical purposes are indeed charitable purposes. Restatement §368; IV Scott §§368, 371 at 2853-56, 2879-80.

F.2d at 1243 (Oakes, J., dissenting); IV Scott §§351, 371.3 at 2797-98, 2884-85; *Monaghan v. Joyce*, 12 Del. Ch. 28, 103 A. 582, 583-84 (1918); *In re Flinn*, [1948] Ch. 241; *In re Garrard*, [1907] 1 Ch. 382; *In re Delany*, [1902] 2 Ch. 642; *In re Barclay*, [1929] 2 Ch. 173; *In re Durbrow's Estate*, 245 N.Y. 469, 477, 157 N.E. 747, 749 (1927); *see also New York City Mission Society v. Board of Pensions*, 261 A.D. 823, 24 N.Y.S.2d 395, 396 (1941). It is sensible and desirable as a matter of policy for courts to treat religiously inspired gifts as donations in trust. Each gift must be considered on its own facts for the purpose of determining the donor's intent. In a vast majority of cases, however, it is likely that a gift made by a follower to a spiritual leader is intended to be used by the leader for the furtherance of the faith. This is true despite the fact that the individual who contributes in response to a solicitation, whether it be on a street corner or in church, seldom attaches a formal declaration of trust to his or her donation. From a policy standpoint, the vulnerability of adherents to solicitations from their religious leaders favors a strong presumption that gifts made to such leaders by their congregants are made for the benefit of the religion rather than for the private benefit of the individual.

(d) **The Rule of United States v. Moon**

The court below approaches the determination of trust existence (and beneficial ownership) from a radically different perspective—one which runs counter to the settled weight of authority. If adopted in other jurisdictions, the potential adverse consequences of this rule for the enforcement of trusts generally and for the maintenance of the integrity of charitable trusts specifically are alarming.

To begin with, the court severely downgraded the significance of donors' intent as a determinative factor in deciding whether a trust exists. It did this in two ways. First, it created an unrealistically exacting standard for proof of intent by holding that to establish the existence of *any* voluntary trust, there must be evidence of "clear and unequivocal" intent to create a trust

and also by laying emphasis on the need for the specific word "trust" in this expression.[6] 718 F.2d at 1224. *Inter alia*, the decision thus specifically extends this requirement, as a matter of first impression, to charitable and religious trusts.

Aside from the fact that all this runs flatly contrary to the settled weight of trust law, in New York and elsewhere, it virtually eliminates, by definition, the creation of an implied trust. It also specifically rules out, in the court's own words, a trust where "only . . . charitable intent of the contributors" is demonstrated. Thus, in the instant case, where Church members specifically testified that they intended the money as a donation to their church, the court excluded consideration of the testimony stating that it was not only insufficient to create a trust but that upon such evidence, the trial court *was not even obliged to instruct on the law of trusts*. *Id.* at 1224, 1225.

As Judge Oakes emphasized in his dissent, citing the abundant New York and other authority, the very thing which gives rise to most charitable trusts *is* a charitable gift or charitable intent; *no* specific words, let alone the word "trust" itself, are necessary. Indeed, many trusts have been confirmed and upheld where there were *no words at all*, only circumstances from which intent could fairly be inferred. *Id.* at 1245-46, 1245 n.4 (Oakes, J., dissenting).

The lower court's holding is all the more troubling because, although the majority expressly concedes "that a charitable *gift* has been made to the Church", it nevertheless asserts that "there is no rule of law that presumes simply from a charitable gift the donors' intent to create a trust." *Id.* at 1225 (emphasis in original). A charitable gift to a church is *incompatible* with a personal gift to an individual and his heirs. As a matter of sound public policy, there *ought* to be a presumption of trust in such

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6 In so doing, it raised by several notches the already rigorous and demanding requirement stated in the trial court's instructions . . . "that intent must be clear and unambigous." 718 F.2d at 1244 n.3 (Oakes, J., dissenting).

circumstances to prevent the conversion of a charitable gift into a personal windfall.

The other way in which the element of intent is either debased or discarded is found in the trial court's instructions, approved on appeal, which listed intent as merely one factor among several which the jury might consider. *Id.* at 1244-45 (Oakes, J., dissenting). The appellate court specifically rejected the suggestion that intent, as an element, was deserving of special emphasis, holding that all of the factors articulated were of *equal* relevance. *Id.* at 1225. As the dissent pointed out, this had the effect of permitting the jury to determine the admittedly crucial issue of trust existence or nonexistence "*without even considering* the crucial issue of donors' intent." *Id.* at 1245 (Oakes, J., dissenting) (emphasis added).

The lower court further departs from generally settled principles of trust law with respect to the elements or circumstances to which it *does* accord weight in determining whether there is an implied trust. Having depreciated donors' intent and relegated it to an obscurity amounting to impotence, the court focuses, rather, on the other facts, which would hitherto have been regarded as peripheral to the establishment of trust existence *vel non*, such as:

(a) Title and control of the funds and property;

(b) Form of organization of claimed beneficiary, e.g., whether formally incorporated or not;

(c) Character of the use to which the funds or property were subsequently applied or put;

(d) Whether the putative trustee seemingly regarded or treated the funds or property as his own;

(e) Whether other persons regarded the funds as being his.

These elements are delineated and discussed in the portion of the court's opinion which finds that the government's evidence was sufficient to establish, beyond a reasonable doubt, that no

trust existed, because the funds "belonged" to, i.e., were beneficially owned by, the defendant.[7] *Id.* at 1220, 1222.

We note at the outset that the very first element is a group of factors—title, dominion and control—which are, under the circumstances, wholly uninformative in terms of evidentiary value on

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7 These elements track fairly closely the factors outlined by the trial court to the jury in its so-called "laundry list" instruction, admittedly not exhaustive. These were:

1) whether the Unification Church movement had a specific organizational structure;
2) whether other Unification Church incorporated entities existed;
3) whether title to the accounts in question was held in the defendant's name;
4) the source of the funds;
5) the intent of the parties who caused the stock and funds to be transferred to Reverend Moon's name;
6) evidence of any agreements as to how the funds would be used;
7) the manner in which the assets were actually used;
8) whether defendant accounted to anyone for the use of the funds.

It will be noted that the instruction directs attention *not* to the intent of the parties who actually *donated* or gave the funds (the source), but rather to the intent of the *parties who caused title to the funds to be placed in defendant Moon's name*. These, as the evidence unequivocally showed, were a handful of key advisors, one of whom was Moon's co-defendant, Kamiyama. Since the intent of the *donors*—i.e., the Church members who actually collected and contributed the funds—was *not even mentioned*, it could hardly have been considered or even taken into account by the jury.

Shortly after enumerating the list of factors the court stated as follows: "There is no trust if the person who receives the money is free to use it for his own benefit." 718 F.2d at 1244 n.3 (Oakes, J., dissenting). To a lay jury which was wholly uninstructed regarding the nice distinction between what one is "free" to do—i.e., is legally *empowered* to do, whether rightly or wrongly—and what one *ought* to do—i.e., is legally *obliged* to do as a trustee—this statement could only have conveyed the idea that in determining where beneficial ownership lies, decisive importance attaches to the personal use of funds or property by the individual who holds legal title. Moreover, it surely left the jury with the view that the money could not be held in trust for the Church so long as the trustee had the discretion to use *any portion* of it for his own living expenses and to pay income taxes on the portion so used, a view that would literally destroy scores of charitable trusts, including those which many churches have purposely chosen as vehicles for placing discretionary funds in the hands of their clergy.

this issue. These factors merely establish the location of legal title and the degree of control that naturally accompanies such title. But *every* trustee holds legal title and must possess dominion and control in order to function as a trustee.[8] The dissent points out, *id.* at 1242 (Oakes, J., dissenting), that this element is one which was virtually conceded from the outset, but which the government, nevertheless, went to great lengths to "prove". This first element thus points neither one way or the other with respect to the critical determination, which is the location of *beneficial*, not legal, ownership.

The second element, form of organization, is simply irrelevant to the existence of the type of trust which was here under consideration. While it is true that a private trust may fail for lack of a definite beneficiary, form of organization is at most an equivocal indication even so, but it has no significance whatever

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8 As the dissent also observes, *id.* at 1243 (Oakes, J., dissenting), the holding of title to property is even less reliable as an indication of beneficial ownership in the case of a minister or other church official, since this is a time honored method of church property tenure. Under the common law, title to real property of the parish in the Anglican Church was taken in the name of the minister and title to personalty in the name of the church wardens. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 46-47 (1815). The holding of diocesan property in the personal name of Catholic prelates, whether as a corporation sole or otherwise, is equally well known and still widespread. *Reid v. Barry*, 93 Fla. 849, 112 So. 846 (1927); *Mannix v. Purcell*, 46 Ohio St. 102, 19 N.E. 572 (1888); *Biscoe v. Thweatt*, 74 Ark. 545, 86 S.W. 432 (1905); *In re Fitzgerald's Estate*, 62 Cal. App. 744, 217 P. 773 (1923); *In re Geppert's Estate*, 75 S.D. 96, 59 N.W.2d 727 (1953); *St. Peter's Roman Catholic Parish v. Urban Redevelopment Authority*, 394 Pa. 194, 146 A.2d 724 (1958), *cert. denied* and *appeal dismissed*, 359 U.S. 435 (1959); *Gospel Tabernacle Body of Christ Church v. Peace Publishers & Co.*, 211 Kan. 420, 506 P.2d 1135 (1973), *adhered to*, 211 Kan. 927, 508 P.2d 849 (1973); *Winn v. Commissioner*, 595 F.2d 1060 (5th Cir. 1979); IV Scott §371.3 at 2884-85; 50 N.Y. Jur.2d *Religious Societies* §111 at 11. There are literally hundreds of cases holding that where church officials held title to property in their personal names, they did so as trustees for their churches. *See, e.g., Sears v. Parker*, 193 Mass. 551, 79 N.E. 772 (1907); *Jones v. Habersham*, 107 U.S. 174, 182 (1882); *Mannix v. Purcell*, 46 Ohio St. 102, 19 N.E. 572 (1888); *Morey v. Riddell*, 205 F.Supp. 918 (S.D. Cal. 1962); *Winn v. Commissioner*, 595 F.2d 1060 (5th Cir. 1979); IV Scott §§351, 371.3 at 2797-98, 2885.

in the case of a religious or charitable trust, where *no beneficiary at all* need be designated.

The third element, perhaps the most startling and potentially harmful of all, is the use to which the funds or assets were put. The prosecution urged, and the court agreed, that if some of the funds were applied or put to personal use, rather than to claimed trust use (here, religious use), this fact disproved trust *existence* and established beneficial ownership in the defendant. In other words, the rule of the case is that beneficial ownership follows use. Hitherto the rule has been that evidence of personal use, if inconsistent with donors' intent, establishes nothing more than a diversion or breach. Under the rule enunciated by the court below, the fact of such use transforms the entire corpus and awards it to the individual rather than to the institution intended by the donors, thus advancing private gain at the expense of public or charitable benefit.[9]

The fourth element simply bootstraps the preceding one and is corollary to it: if an individual uses funds for personal purposes and seemingly treats some of them as his own, he will be held to be the beneficial owner.

Lastly, a further bootstrap: if others' opinions reinforce the preceding indications, conclusive weight will be given to the determination.

It will be observed that every one of these elements save the second—which is demonstrably irrelevant—is under the control of the individual in possession of the funds or assets, i.e., the putative trustee, and that he is thus placed by the Second Circuit in a position to orchestrate or manipulate the very elements relied upon to determine beneficial ownership. On the other hand, the one element *not* subject to such control or manipulation, donors' intent, is hedged about and sharply diminished in importance.

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9 The decision also contradicts other federal cases holding that "personal" use of some part of trust funds by trustees—e.g., for salaries or living expenses—is by no means necessarily inconsistent with trust existence or purpose. *See, e.g., Morey v. Riddell*, 205 F.Supp. 918, 921 (S.D. Cal. 1962); *Winn v. Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979).

(e) Enforcement Implications

Although the lower court's decision in this case ostensibly only articulates a rule applicable to federal criminal proceedings, it may, if followed by other courts, have planted the seeds for emasculation of effective charitable trust enforcement. If carried to its logical conclusion, it may, in fact, mark the elimination of criminal charges such as embezzlement as a remedy for extreme abuses. This consequence, of course, shocks the conscience, but if the rule of this decision is properly understood, it is not difficult to see how this conclusion might follow.

In order to prove civil or criminal charges against a trustee relating to misappropriation of trust assets, it is first necessary to establish the existence of a trust. Applying the rules enunciated by the court below, a defaulting trustee has only to take a few simple steps that make the offense obvious in order to negate trust existence and thus be clothed with a formidable defensive armor. One need only make certain that title to the property or funds is placed in his or her own name; that they are spent or applied to uses which appear conspicuously personal; and that, in using the funds, the trustee clearly and overtly regards the funds as his or her own. It will further be helpful to the cause if the trustee so states to friends in the hope that they will so opine to others. Lastly, the trustee might be well advised to report at least the interest from the funds as personal income on his or her tax returns.

Under the principles enunciated by the Second Circuit, the trustee would, in the absence of a specific written declaration of trust, be virtually invulnerable to enforcement of the trust or penalty for its abuse. The trustee could point to the very elements emphasized by the court as being conclusively determinative that no trust existed. An attorney general charged with enforcing and protecting the integrity of charitable trusts would be hard-pressed to establish the factual predicate of jurisdiction: the existence of a charitable trust. Even in cases in which the Second Circuit's factoral analysis of trust existence *might* permit a conclusion that a trust existed, an attorney general would be required to divert resources from trust enforcement in order to

meet the Second Circuit's enhanced burden to prove trust existence.

Under the lower court's analysis, even the clearest cases, where a trust is evidenced by written declaration, are complicated. The writing evidences at most an intent on the part of the trustor/donor to create a trust; and this, according to the court's teaching, is simply one of several elements, all of which are to be accorded *equal* weight. *Id.* at 1225. In other words, the putative trustee's personal use (or misuse) of the funds; his treating of them as his own; his title, dominion and control over those funds; and the opinions of his acquaintances are all elements which are to be considered each on an equal footing with the lone element of the trustor's intent, which, indeed, need not actually be considered at all. *Id.* at 1242, 1245 (Oakes, J., dissenting).

The Second Circuit's decision, if followed elsewhere, would not merely handicap the states in their efforts to enforce charitable trusts. Under this rule, the beneficiaries of all trusts would be faced with similar difficulties in attempting to enforce accountability against fiduciaries. The potential for mischief is virtually limitless, for the rule is akin to saying that a thief, by virtue of his conversion, acquires full and defensible title to the subject of his theft. Little imagination is needed to appreciate the chaos to which such a rule could lead.

This precedent demonstrably casts a cloud over an important role and responsibility of the attorney general offices of the *amici* states--namely, that of enforcing and protecting charitable trusts. To hold that the existence of certain uses triggers a federal conclusion that the assets belong in their entirety to the individuals who control them, as this case does, is to turn the guiding principles of trust law and enforcement upside down. It is no wonder that Judge James L. Oakes, formerly the Attorney General of Vermont, dissented so forcefully from the Second Circuit's ruling.

Even if a state attorney general would not be wholly disabled, vis-a-vis faithless trustees, by this federal precedent, and even if such an attorney general could continue to invoke principles of ordinary and charitable trust law in his own state, the attorney

general's office is, at the very least, placed in a position of antipathetic tension with federal tax and criminal justice authorities by the Second Circuit's holding.

CONCLUSION

Because of the strong, but limited, focus of their direct concern, which is the impact of the subject case upon a vital aspect of state trust law, *amici* do not address or take any position with respect to the "myriad of constitutional problems involved here" or the "troubling issues of religious persecution and abridgement of free speech" which, as noted in the majority opinion, *id.* at 1216, are presented by other aspects of the case. Even if these constitutional issues did not exist, however, the concern of these *amici* and the urgency of the issue they have argued herein would warrant this Court's attention. The rules enunciated by the Second Circuit threaten mischief at best and havoc at worst in a vital area of the law hitherto regarded as well settled.

Amici therefore strongly and respectfully urged that the Petition for Certiorari be granted.

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